(8)

No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, AND EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHEMICAL MANUFACTURERS ASSOCIATION, AND THE AMERICAN CORPORATE COUNSEL ASSOCIATION, IN SUPPORT OF PETITIONER

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 637-3058

[Of Counsel Continued on Inside Cover]

MALCOLM E. WHEELER
Counsel of Record
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000
Counsel for Amici Curiae

May 31, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

DAVID F. ZOLL
Vice President and General Counsel
CHEMICAL MANUFACTURERS ASSOCIATION
2501 M Street, N.W.
Washington, D.C. 20037
(202) 887-1100

NANCY NORD
AMERICAN CORPORATE COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-4522

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States, the National Association of Manufacturers, the Chemical Manufacturers Association, and the American Corporate Counsel Association, with the consent of the parties, file this brief as *amici curiae* in support of the petitioner.*

The United States Chamber of Commerce is America's largest federation of businesses, representing more than

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* Consent letters have been filed with the Clerk.

180,000 companies, several thousand trade and professional associations, and hundreds of state and local Chambers of Commerce. The National Association of Manufacturers is an association of approximately 13,500 companies and subsidiaries that together employ 85% of all manufacturing workers in the United States and produce more than 80% of the nation's manufactured goods. The Chemical Manufacturers Association is a non-profit trade association whose member companies produce, market, and use industrial chemicals. Its member companies comprise 90% of the production capacity of basic industrial chemicals in the United States. The American Corporate Counsel Association is a national bar association of approximately 8,000 attorneys from the legal staffs of corporations and other business entities in the private sector who are called upon to advise their clients regarding litigation and settlement of claims filed against their clients.

This case is of interest to these *amici* because business entities are among the primary victims of unpredictable and arbitrary punitive damages verdicts that have been awarded without adequate procedural safeguards, with increasing frequency, and in dramatically larger sums in recent years. As principal voices of the business and manufacturing communities, these *amici* are well suited to present to the Court the effects, and the due process infirmities, of a system that allows punitive damages to be imposed by juries without guidance or specified restrictions as to when and in what amount such punishment should be inflicted.

SUMMARY OF ARGUMENT

In punitive damages proceedings in Alabama, once the defendant has been found to have committed a punishable act, juries have, and are told that they have, total discretion in deciding whether to withhold or impose punitive damages. Juries also are told that the amount of punitive damages is a matter for their discretion. Juries are told

that the purposes of punitive damages are to punish and deter, but those terms are not defined, the limitations dictated by deterrent and retributive principles are not identified, and the information needed to apply those principles is not provided. Nor is any other standard, limit, or guidance provided.

The process of judicial review does not cure these deficiencies, because that process is equally standardless. Although trial courts are required to state reasons for granting or denying motions for remittitur and new trials, punitive damages verdicts are allowed to stand unless the "judicial conscience" is "shocked" by the excessiveness of the verdict or by proof of "bias, passion, corruption, or other improper motive."

Because of this absence of standards at every level, both the imposition of any punitive award and the size of the punitive award that may follow from any contemplated act are entirely unpredictable. There is no consistency of verdicts. And the license given to juries invites and yields decisions that are arbitrary, invidiously discriminatory, and subject to no meaningful judicial review.

These punitive damages proceedings provide a paradigm of what the Due Process Clause of the Fourteenth Amendment seeks to prevent: the use of unduly vague laws to subject citizens to deprivation and punishment. Alabama therefore should be required to adopt punitive damages standards, either legislative or common law, that provide greater specificity and predictability and that more carefully guard against arbitrary and invidiously discriminatory punishment. The adoption of such standards not only will better safeguard defendants' rights, but will better serve the state's legitimate interests in achieving *proper* deterrence and punishment in a judicially efficient manner.

SUMMARY OF THE PUNITIVE DAMAGES SYSTEM

The purposes, procedural characteristics, and results of punitive damages proceedings in the State of Alabama, and in like jurisdictions, are central to the due process issue addressed in this brief. They are as follows.

A. Purposes of Punitive Damages

Punitive damages in Alabama, as elsewhere, are penal in nature. The trial court in this case instructed the jury that punitive damages are "to punish the defendant" and "to make an example" and are "not to compensate the plaintiff for any injury." (Tr. 897.) *See Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988) ("the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter others from committing similar wrongs in the future").

B. Procedural Characteristics of Punitive Damages Proceedings

The punitive damages system in Alabama, like the punitive damages systems in most other states, is characterized by the absence of standards at three levels: (1) The absence of standards given to juries to guide them in deciding whether punitive damages should be awarded, once the requisite culpability has been found; (2) the absence of standards given to juries to guide them in determining the appropriate size for a punitive damages award; and (3) the absence of objective standards for judicial review of juries' punitive damages verdicts. All of these procedural infirmities infected the proceedings in this case.[1]

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[1] Alabama punitive damages proceedings suffer from other procedural infirmities as well. These include a failure to require proof of the punitive damages claims by more than a mere preponderance of the evidence and a failure to require that the punitive damages, or "sentencing," issues be tried only after underlying tort liability has been found. *See generally* Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269, 276-322 (1983).

1. *The Absence of Standards to Guide Juries in Deciding Whether to Award Punitive Damages, Once the Requisite Culpability Has Been Found*

Once it has determined that a defendant committed an act that permits an award of punitive damages, an Alabama jury has unbridled discretion to award or withhold punitive damages. The jury is given no standard and no guideline that tells it how it must or must not exercise that discretion. The jury is simply instructed that it may award punitive damages if it finds that the defendant acted with the requisite culpability. Here, for example, the jury was told:

> Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages . . . . So, if you feel [—] or not feel, but if you are reasonably satisfied from the evidence [—] that the plaintiff you are talking about has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages . . . . Imposition of punitive damages is entirely discretionary with the jury . . . .

(Tr. 897-98.) *See Alabama Power Co. v. Rembert*, 208 So. 2d 205, 206 (Ala. 1968); *Austin v. Tennessee Biscuit Co.*, 52 So. 2d 190, 194 (Ala. 1951); W. Prosser & W.P. Keeton, *The Law of Torts* § 3, at 14 (5th ed. 1984).

2. *The Absence of Standards to Limit or Guide Juries in Determining What Sum to Award as Punitive Damages*

Alabama, like most other states, also provides no standard to limit or guide juries in determining what amount to award as punitive damages, once the decision to award some punitive damages has been made. Although the dual purposes of deterrence and punishment may be stated

to the jury, no definition of either term is provided, and no explanation of the limits that deterrent and retributive principles dictate is articulated. The only additional information provided by the trial court in this case, for example, was as follows:

> Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.

(Tr. 898.) *See Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988).

This absence of standards and guidance reflects a stark fact of Alabama law: "There is no legal measure of [punitive] damages" in Alabama. *K-Mart Corp. v. Weston*, 530 So. 2d 736, 740 (Ala. 1988) (quoting *Advertiser Co. v. Jones*, 169 Ala. 196, 209, 53 So. 759, 764 (1910)). Punitive damages "need bear no relationship to actual damages, and their award is left largely to the discretion of the jury." *City Bank of Alabama v. Eskridge*, 521 So. 2d 931, 933 (Ala. 1988). *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Vermont law) ("punitive damages are imposed by juries guided by little more than an admonition to do what they think is best") (Brennan & Marshall, JJ., concurring).

Thus, no maximum award is specified by the legislature or by the courts. No relationship between the harm caused and the size of the punitive award is required or suggested. No proportionality between the punishment imposed in one case for one type of wrongful conduct and the punishment imposed in other cases for other types of conduct is required or suggested. No similarity between the punishment imposed in one case for particular conduct and the punishment imposed in other cases for identical or similar conduct is required or suggested. No instruction is given as to what must be considered or what must not be considered in determining the amount

of punishment. No instruction regarding the deterrent effects of compensatory damages and litigation costs is given, and juries are not told that they must, should, or may consider those effects. No information about statutory civil penalties and criminal fines for similar and dissimilar conduct is given. The jury is not even told that it must refrain from awarding more than is necessary to achieve the proper amount of deterrence and punishment.[2]

3. *The Absence of an Objective Standard for Judicial Review of Punitive Damages Verdicts*

In deciding whether to grant a motion for remittitur or a new trial attacking a punitive damages verdict awarded pursuant to the standardless proceedings described above, courts follow the rule that juries' punitive damages verdicts "are presumed correct." *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537, 543 (Ala. 1989). Remittitur or a new trial may be ordered

> only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive . . . .

Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986). Whether a punitive damages award is excessive "depends upon whether or not the judicial conscience is shocked." *Roberson v. Ammons*, 477 So. 2d 957, 961 (Ala. 1985) (quoting *U-Haul Co. v. Long*, 382 So. 2d 545, 548 (Ala. 1980)). Thus, although trial courts must "reflect in the record the reasons for interfering

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[2] "Instructions range from a kind of verbal shrug of the shoulders to the pious and flabby abstractions . . . . The short version might be, 'Do right, be good.'" Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 872 n.102 (1989). *See* Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 979 (1989) ("stated criteria employed for imposing punitive damages comprise a multiplicity of vague, overlapping terms").

with a jury verdict, or refusing to do so," *Hammond v. City of Gadsden*, 493 So. 2d at 1379, judicial review remains as standardless as the juries' initial determinations.[3]

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[3] In *Hammond* the Alabama Supreme Court identified only four factors that it labeled "appropriate for the trial court's consideration": (1) "The culpability of the defendant's conduct"; (2) "the desirability of discouraging others from similar conduct"; (3) "the impact upon the parties"; and (4) "the impact on innocent third parties." 493 So. 2d at 1379. That list is little more than a restatement of the rule that punitive damages are imposed to punish and to deter. It neither identifies the limiting principles of deterrent and retributive doctrines nor reveals the sources or types of information that is to be considered.

More importantly, immediately after having listed the four factors "appropriate for the trial court's consideration," the supreme court stated: "In adopting this new procedure, we emphasize that no substantial rule of law is changed. A trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff; nor may the trial court substitute its judgment for that of the jury . . . . We simply now require the trial court to state for the record the factors considered in either granting or denying a motion for new trial . . . ." *Id.* (citations omitted).

Thus, the required listing of factors does nothing to search out or prevent arbitrary, discriminatory, or otherwise unjust verdicts. Quite to the contrary, it serves as a tool for appellate courts to use to *prevent* trial courts from modifying jury verdicts.

In addition, almost any statement by a trial court in support of a denial of a motion for remittitur will satisfy the *Hammond* requirement. In this case, for example, the trial court gave only three reasons why the seven-figure punishment of Pacific Mutual was proper: (1) "It goes without saying that it is highly desirable to discourage others, similarly situated from similar conduct" [*i.e.*, conduct similar to that of Mr. Ruffin, whose unauthorized theft of premiums made Pacific Mutual a victim]; (2) "The jury seems to fashioned [*sic*] their awards in proportion to the damage done each plaintiff" [*i.e.*, the awards within the one case were proportional to each other, but may or may not have been proportional when compared to other awards, to relevant civil and criminal penalties, or to any other guideline]; and (3) "The jury was composed of male and female, white and black." (Petition for Writ of Certiorari at A-15.)

No objective criterion has been articulated to provide guidance or predictability as to when the "judicial conscience" is likely to be "shocked." No objective criterion has been articulated to provide guidance or predictability as to how or when a court is likely to find that a damages award is based on "bias" or "passion."

Unlike courts in criminal proceedings and actions for civil penalties, courts reviewing punitive damages awards receive no standard, limitation, or guidance from the legislature. Courts, like juries, do not consider the presence or absence of proportionality between the punitive damages awards in similar or dissimilar cases. Courts, like juries, do not consider the level or availability of criminal fines and civil penalties for similar and dissimilar conduct. Courts, like juries, do not consider the deterrent effect of compensatory damages, defense costs, or regulatory proceedings arising out of the same conduct. Instead, given that juries are not instructed to consider any of those matters, it apparently would be error for a court to order remittitur or a new trial on the basis of any of them, because the court may not "substitute its judgment for that of the jury." *Hammond v. City of Gadsden*, 493 So. 2d at 1379.

C. Effects of the Current Punitive Damages System

A comprehensive analysis of jury verdicts in the United States, prepared by the RAND Institute for Civil Justice, shows that the growth in the average award in the types of tort litigation that manufacturers commonly face "has been truly explosive, reflecting increases ranging from 200 to more than 1000 percent" from the period 1960-1964 to 1980-1984. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics*, 18 (1987). That explosion has been paralleled by a dramatic increase in both the frequency and the size of punitive damages awards against manufacturers.

Before 1970, for example, there was only one reported appellate court decision upholding an award of punitive damages in a product liability case—an award of $250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by without a multi-million dollar punitive damages verdict against a manufacturer.[4]

Researchers for the RAND Institute for Civil Justice also have empirically determined that "[c]orporate defendants are . . . more likely than individuals or public agencies to be the target of [punitive damages] awards." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* iii (1987). Not only are businesses thus more frequently targeted, but "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." *Id.* at 50. The net result has been systematic

[4] *See, e.g.*, the following reported verdicts in 1988: *Rajala v. Allied Corp.*, No. 82-228K (D. Kan. Apr. 25, 1988), *appeal docketed* (10th Cir. May 9, 1988) ($60 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Ct. App. Feb. 29, 1988) ($11.25 million punitive damages verdict), *rev'd*, 780 P.2d 566 (Haw. 1989); *Batteast v. Wyeth Laboratories, Inc.*, 172 Ill. App. 3d 114, 526 N.E.2d 428 ($13 million punitive damages verdict), *appeal granted*, 123 Ill. 2d 556, 128 Ill. Dec. 887, 535 N.E.2d 398 (1988); *FDIC v. W.R. Grace Co.*, 691 F. Supp. 87 (N.D. Ill. 1988) ($75 million punitive damages verdict), *aff'd in part, rev'd in part*, 877 F.2d 614 (1989), *cert. denied*, 110 S. Ct. 1524 (1990); *Kociemba v. G.D. Searle & Co.*, 16 Prod. Safety & Liab. Rep. (BNA) 893 (D. Minn. Sept. 19, 1988) ($7 million punitive damages verdict); *Roberts v. Seven-Up*, 16 Prod. Safety & Liab. Rep. (BNA) 466 (Utah Dist. Ct. Feb. 18, 1988) ($10 million punitive damages verdict, remitted to $300,000); *Mancari v. Raymark Indus. Inc.*, 16 Prod. Safety & Liab. Rep. (BNA) 318 (Del. Super. Ct. Mar 17, 1988) ($22 million punitive damages verdict, new trial granted); *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. App. 1988) ($42.9 million punitive damages verdict, new trial granted); *Hines v. Ariens Co.* (Tex. Dist. Ct. July 22, 1988) ($5 million punitive damages verdict) (reported in *The 10 Largest Jury Verdicts of 1988*, A.B.A. J., Mar. 1989, at 45, 47).

discrimination against business defendants: "Juries also award more money when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect . . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik, M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

The effect of these massive and discriminatory punitive awards on American industry, and indirectly on the American public, has been devastating. *Cf. Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) ("The threat of such enormous awards has a detrimental effect on the research and development of new products") (O'Connor & Scalia, JJ., concurring). Important health products have drastically risen in price or been withdrawn from the market altogether. *See Brown v. Superior Court*, 44 Cal. 3d 1049, 1064, 245 Cal. Rptr. 412, 421, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin from market after price increased by more than 300 percent; also discussing withdrawal of all but two manufacturers of diphtheria-pertussis-tetanus vaccine, and price increase from eleven cents per dose to $11.40 per dose in four years); Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) (discussing drug manufacturers' refusal to supply influenza vaccine until Government assumed the risk of lawsuits resulting from injuries caused by the vaccine); U.S. Department of Justice, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987) (stating that an $8 million punitive damages award "almost jeopardized the viability of the entire polio vaccination program," but was reversed).

Equally important new products have been withheld from introduction altogether. *See Brown v. Superior Court*, 44 Cal. 3d at 1065, 245 Cal. Rptr. at 421, 751

P.2d at 480 (discussing non-introduction of new drug for the treatment of vision problems because of unavailability of adequate liability insurance); Mahoney, *Punitive Damages: The Courts Are Curbing Creativity*, N.Y. Times, Dec. 11, 1988, § 3, at 3, col. 1 (possible substitute for asbestos abandoned "just before commercialization" because of punitive damages/tort system). American manufacturers have fallen behind in the development of major product groups. *See, e.g.*, Connell, *The Crisis in Contraception*, 1987 Technology Review 47 (statement by Elizabeth B. Connell, M.D., member of FDA Obstetrics and Gynecology Advisory Committee, that "the United States is losing its leadership role in this area of contraceptive technology—with potentially disastrous consequences for women and men in this country and elsewhere").

A study conducted by the United States Department of Justice on the liability crisis indicated that the prevailing punitive damages systems also "serve as a significant obstacle to the settlement process by giving the plaintiff unrealistic expectations of the value of his case even where the defendant has made a generous settlement offer." *See* U.S. Department of Justice, *An Update on the Liability Crisis: Tort Policy Working Group, supra*, at 51. "It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon." *Id.* (quoting Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. Mich. J.L. Ref. 575, 612 (1985)).

ARGUMENT

I. ALABAMA'S STANDARDLESS PROCEDURES FOR IMPOSING PUNITIVE DAMAGES FAIL TO PROVIDE DUE PROCESS OF LAW

If one were to set out to design a system of punishment with the least amount of notice, consistency, and predictability, the greatest likelihood of arbitrariness and invidious discrimination, and the least likelihood of properly serving the goals of optimal deterrence and retribution, one surely would design a system that makes no attempt to relate the size or frequency of punishment to the avowed purposes of deterrence and retribution. The sentencing entity would have, and would be told that it has, unfettered discretion to withhold or inflict punishment, once the triggering conduct had been established. The sentencing entity also would have, and would be told that it has, unfettered discretion to inflict punishment in any amount that it wished. The Alabama punitive damages system is just such a system.

This system violates the Due Process Clause of the Fourteenth Amendment for three reasons. It fails to provide safeguards against arbitrary and invidiously discriminatory punishment. It fails to provide notice of who will be punished. And it fails to provide notice of the penal consequences of conduct that may be punished.

A. Alabama Fails to Provide Safeguards Against the Arbitrary and Invidiously Discriminatory Infliction of Punitive Damages

This Court long ago established that the Due Process Clause of the Fourteenth Amendment was "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986), *quoting Hurtado v. California*, 110 U.S. 516, 527 (1884). In opinions spanning a period of almost twenty years, most of the members of this Court

have recognized that the prevailing punitive damages system fails to satisfy that requirement. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages laws leave juries "free to use their discretion selectively to punish expressions of unpopular views") (Powell, J., joined by Marshall, Blackmun, & Rehnquist, JJ.); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979) ("punitive damages may be employed to punish unpopular defendants") (Marshall, J., joined by Brennan, Stewart, White, & Powell, JJ.); *Smith v. Wade*, 461 U.S. 30, 59 (1983) ("punitive damages are frequently based upon the caprice and prejudice of jurors") (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award.") (Blackmun, J., joined by Burger, C.J., and Stewart, White, Powell, & Rehnquist, JJ.); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74-75 (1971) (when punitive damages "bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an infinitely wide range of penalties wholly unpredictable in amount . . . . Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the States to permit punitive damages that bear no discernible relationship to the actual harm caused") (Harlan, J., dissenting); *id.* at 84 ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others.") (Marshall, J., dissenting).

Nevertheless, most states have failed to cure the systemic infirmities that have led to the rash of punitive

damages awards described in the Summary of the Punitive Damages System of this brief. *See* pp. 9-11, *supra*. Alabama, for one, still does not limit juries' ability to base their decisions whether to punish and, if so, in what amount on wholly improper factors such as race, residency, sex, or corporate status.

The due process concern presented by such standardless systems is well expressed in the void-for-vagueness doctrine, which requires that penal, quasi-penal laws, and other laws be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (criminal statute); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (civil penalties, "quasi-criminal" ordinance); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (civil action based on Minnesota Human Rights Act). The doctrine's primary goal is to ensure that juries and law-enforcement personnel do not "pursue their personal predilections." *Kolender*, 461 U.S. at 358. It also aims to reduce "the danger of caprice and discrimination in the administration of the laws" and to "permit[] meaningful judicial review." *Roberts*, 468 U.S. at 629.

The Constitution's antipathy for vague laws finds its clearest voice in the prohibition "against arbitrary and discriminatory punishment." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (applying Due Process Clause). *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As the Court has recognized in a variety of contexts, such arbitrariness and unjust discrimination cannot be prevented unless punishments are imposed pursuant to cognizable, objective standards. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) ("It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. . . . Otherwise, the system cannot function in a consistent and rational manner.'"); *cf. Giaccio*, 382 U.S. at 402 (Due

Process Clause violated by "vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs"). In the absence of such standards, juries can silently base their decisions to punish, and the severity of their punishments, upon invidious discrimination, raw emotion, and even whim. *Cf. Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (child custody proceedings "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge"). Any punishment so motivated, no matter how small, would be excessive. *See Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

Punishments therefore must be constrained by cognizable limits and guidelines fixed *before* the defendant has acted. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"); *Giaccio*, 382 U.S. at 405 n.8 (referring to constitutionality of allowing juries "to fix punishment *within legally prescribed limits*") (emphasis added).

Alabama's punitive damages laws fall woefully short of those minimum due process requirements. By giving juries unfettered discretion—and especially by *telling* juries that they have unfettered discretion—to withhold or inflict punitive damages, once the requisite misconduct has been established, Alabama "impermissibly delegates basic policy matters to . . . juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). *Accord Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 684-85 (1968). In particular, by giving juries no guidance, and instead

encouraging them to base their decision whether to punish on their own unstated values and notions, Alabama delegates to juries the basic policy matter of what factors should and should not govern the decision whether to punish any citizen.

Similarly, by giving juries no guidance for determining how much punishment should be inflicted, once the decision to award some punitive damages has been reached, Alabama impermissibly delegates to juries the basic policy matter of what factors should and should not determine the size of punitive damages awards.[5]

Because of the absence of any jury standard, the great deference and extremely narrow scope of review applied to jury verdicts by reviewing courts, and the absence of any objective standard of judicial review, the Alabama punitive damages laws are also too vague to permit the "meaningful judicial review" required by *Roberts*. In sum, the Alabama punitive damages laws are impermissibly vague at every level.

As a result, not only are citizens arbitrarily and unfairly punished, but the legitimate purposes of punitive damages are ill-served. Any case-to-case consistency in the relationship between the severity of punishment and the gravity of wrongdoing must be purely fortuitous. Similarly, because juries are not given any guidance regarding the principles of deterrence or retribution, any relationship between those principles and the juries' awards must be wholly accidental.

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[5] *See* Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala. L. Rev. 1053, 1055 (1989) ("Today we no longer recognize unlimited power by juries to make legal policy based on their own values; the prevailing concept is that law is a rational instrument to implement the policies of the state. The notion that individual juries may willy-nilly punish those who offend them is anomalous in a system of tort law that increasingly conceives of itself as devoted to creating rational incentives for appropriate levels of safety.").

Punitive awards imposed by juries with such untrammeled discretion do not promote proper deterrence. Deterrence theory assumes that potential actors will rationally weigh the benefits and costs likely to flow from contemplated wrongful conduct. Rational deterrence obtains, therefore, only if the actors are informed about the magnitude of the costs, including punishments, they are likely to incur if they engage in the proscribed conduct. If, as in Alabama, laws fail to establish standards for punitive damages awards, actors contemplating wrongful conduct can only guess at the likely consequences of their misdeeds, as they must do in Alabama.

Rational deterrence also requires that punishment be imposed in the amount, and only in the amount, necessary to ensure that the actors' expected costs (*i.e.*, actual costs adjusted upward to account for the probability that the conduct will not be detected and successfully prosecuted by injured persons), will equal any gain that they would otherwise expect to obtain from the contemplated wrong conduct. *See H. Packer, The Limits of the Criminal Sanction* 45-48 (1968); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 23-24, 43-53 (1982); Note, *Punitive Damages for Libel*, 98 Harv. L. Rev. 847, 849-51 (1985). Punishment in any other amount will either deter desirable activity or fail to deter undesirable activity.

Punitive awards imposed pursuant to standardless jury submissions also fail to serve the state's retributive purposes. The basic test of the propriety of punishment as retribution is that the punishment must be proportionate to the wrongdoing. *See* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 846 (1972). Punitive damages imposed pursuant to standardless jury submissions violate that proportionality requirement. *See* Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 945-46 (1989).

It is no answer for Alabama and others to assert that the total absence of standards merely provides for the exercise of jury discretion. The authority that juries are exercising is not "discretion in the legal sense of that term, but . . . mere will. It is purely arbitrary and acknowledges neither guidance nor restraint." *Yick Wo v. Hopkins*, 118 U.S. at 366-67 (reviewing exercise of discretion in Fifth Amendment context).

> [D]iscretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. Otherwise, . . . "[i]t is always unknown: It is different in different men: . . . In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable."

McGautha v. California, 402 U.S. 183, 285 (1971) (Brennan, Douglas & Marshall, JJ., dissenting). *See also Bankers Life & Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (the "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process") (O'Connor & Scalia, JJ., concurring in judgment).

Nor is it prohibitively difficult for legislatures or courts to establish limits on, or objective standards for, punitive damages awards in order to reduce the risk or scope of arbitrary and discriminatory actions of juries. Alabama, for example, has fixed maximum criminal fines for the entire panoply of criminal acts (*see, e.g.*, Ala. Code § 13A-5-11 (felonies); Ala. Code § 13A-5-12 (misdemeanors and violations); maximum civil penalties for a wide variety of civil misconduct (*see, e.g.*, Ala. Code § 2-2-18 (Alabama Pesticide Act); Ala. Code § 8-22-16 (motor fuel marketing); Ala. Code § 9-16-94 (violation of permit condition for surface mining control and reclamation); Ala. Code § 22-14-14 (regulation of sources of ionizing); Ala. Code § 22-33-13 (toxic substances in the workplace); Ala. Code § 24-5-12 (mobile homes)); and maximum punitive

damages for still other civil misconduct (*see, e.g.*, Ala. Code § 6-5-544 (medical malpractice)). Some of these fixed civil fines and punitive awards are for conduct that is similar in effect and culpability to the fraud of Mr. Ruffin in this case. *See, e.g.*, Ala. Code § 8-19-11 (maximum civil penalties for deceptive trade practices).

In sum, punitive damages are imposed in Alabama pursuant to laws that specify no limits, no required relationship to culpability, no required relationship to the punishments for other acts of wrongdoing, no other objective standard for determining when and in what amount they are to be imposed, and no objective standard of judicial review. Punitive awards thus imposed serve no valid state interest.[6] Under these circumstances, the state's legislature, or its courts through common law development, should be required to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing [punishment]." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).[7]

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[6] As the Court previously has declared, "States have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

[7] *See generally United States v. Evans*, 333 U.S. 483, 486 (1948) ("In our system, so far at least as concerns the federal process, defining crimes and fixing penalties are legislative, not judicial functions."); *United States v. Batchelder*, 442 U.S. at 125-26 (discussing "the Legislature's responsibility to fix criminal penalties"); *Gregg v. Georgia*, 428 U.S. at 174 n.19 (plurality opinion) ("legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values").

B. Alabama's Punitive Damages Laws Fail to Provide Adequate Notice of Who Will Be Punished or of the Penal Consequences of Conduct that May Be Punished

Alabama's punitive damages laws also violate the due process requirement that statutes be specific enough to provide "actual notice to citizens" regarding the consequences of their contemplated conduct. *Kolender v. Lawson*, 461 U.S. at 357-58. In view of the complete absence of guidance as to when and in what amount punitive damages will be inflicted for *any* type of conduct, it is beyond dispute that those laws are "so vague that [persons] of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Roberts*, 468 U.S. at 629. Similarly, the vagueness of the laws precludes the predictability that due process requires so that potential defendants can structure their conduct with a reasonable understanding of the consequences. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

This absence of notice in laws governing the punishment to be imposed is as unacceptable to due process principles as is an absence of notice in laws describing the conduct that triggers punishment. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) (Due Process Clause applies to penalty provisions that "do not state with sufficient clarity the consequences of violating a given criminal statute"); *see also, e.g., Albernaz v. United States*, 450 U.S. 333, 342 (1981); *Bifulco v. United States*, 447 U.S. 381, 387 (1980). And the requirement of fair notice applies to penalties that are denominated as "civil," rather than "criminal."[8] In our legal system, a defendant, civil

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[8] *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. at 402 ("[b]oth liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be

or criminal, is entitled to fair warning of the sanctions that the law can impose on him.

The constitutional necessity for fair notice of penal consequences is so strong that it is reflected in the Constitution's explicit proscription of *ex post facto* laws, a proscription that invalidates "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 390 (1798) (Chase, J., separate opinion).[9]

Without predetermined standards for punishments, that principle is eviscerated. When a state's legislature and courts fail to establish predetermined standards, and leave to juries' unchanneled discretion both the decision whether to punish and the decision of how severely to punish, there is no effective limit on or consistency of, and therefore no notice of, the punishment to be applied or enforced. Each

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avoided by the simple label [of civil or criminal] a State chooses to fasten upon its conduct or its statute"); *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 240-243 (1932) (the due process right to fair notice applies to sanctions imposed in a civil proceeding); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 463 (1927) ("[t]he principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation"); *Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) (The due process principle of fair notice is "not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all").

[9] *Accord Lindsey v. Washington*, 301 U.S. 397, 401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); *In re Medley*, 134 U.S. 160, 171 (1890) ("no one can be criminally punished in this country except according to a law prescribed . . . before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased").

jury is left free to base the level of punishment on an *ad hoc*, retrospective reaction to the status and characteristics of a particular defendant, rather than on legitimate penal purposes.

For example, because the jury's decisions whether and in what amount to award punitive damages are unreviewable and may be based upon anything at all, it would be pure happenstance if any particular punitive award were to be proportionate to the wrongdoing committed or serve any other legitimate purpose. In other instances of the same (or more culpable) conduct by other defendants, juries may have awarded only compensatory damages and refrained, on the basis of bias, caprice, or sympathy, from awarding punitive damages. *Cf. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (capital punishment imposed under the challenged statute was "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."). Under these circumstances, citizens have no notice of the likely penal consequences of their actions.

In this case, for example, Respondent Pacific Mutual hardly could have suspected that, solely on the basis of *respondeat superior*, without any negligence, much less recklessness or intentional misconduct, on its part, and without any gain derived by it as a result of its agent's unauthorized misconduct, it might be held liable for one of the largest punitive damages awards ever affirmed by the Alabama appellate courts. In fact, given what must have been hundreds of prior judgments in Alabama for fraud and more serious tortious conduct, given the small number of prior punitive damages awards exceeding a million dollars, and given the small amount of compensatory damages involved in this case, the punitive damages

award sought and apparently given in this case was quite unpredictable. *See* Elliott, *supra*, 40 Ala. L. Rev. at 1057 ("The central failing of punitive damages that renders them incompatible with modern tort law is *unpredictability*.").

II. DUE PROCESS REQUIRES THAT ALABAMA ESTABLISH LEGAL STANDARDS TO DETERMINE WHEN AND IN WHAT AMOUNT PUNITIVE DAMAGES ARE TO BE INFLICTED

The fundamental flaw in Alabama's punitive damages system is the combined absences of standards for the determination of whether to award punitive damages, for the determination of how large a punitive damages award may or should be, and for judicial review of punitive damages verdicts. If punitive damages are to continue to be awarded, that flaw must be remedied by the adoption, by the Alabama Legislature or the Alabama courts, of standards to fill the void.

Although an appropriate remedy by this Court may be to reverse and remand to the Alabama Supreme Court to enable that court and the Alabama Legislature to adopt specific standards consistent with general principles articulated in the opinion to be provided by this Court, certain requirements are fundamentally necessary to reduce to an acceptable level the vagueness of the current laws.

Juries currently are instructed that a purpose of punitive damages is to deter similar wrongful conduct in the future. They also should be instructed that society would be harmed by, and they must not award, punitive damages in any amount larger than what is needed to serve that purpose. They should be instructed that they must not allow anger or any other emotion they might feel, or the defendant's residence, race, or corporate nature, or any other aspect of its status, to affect either the decision whether to award punitive damages or the decision of

how much to award. This much is needed to prevent juries from believing that, as the law currently tells them, they have total discretion in making punitive damages decisions.

Juries should not be instructed, as they are today, that a second, separate purpose of punitive damages is "to punish." [10] Especially when, as under the current system, the word "punishment" is left undefined and no attempt is made to explain to the jury the relationship between deterrence and punishment or the limits dictated by retributive principles, the articulation of deterrence and punishment as separate purposes can only confuse the jury. In addition, punitive damages awarded to deter will also inflict punishment; the possibility that the articulation of punishment as a separate purpose in jury instructions may in some instances result in a punitive damages award that more closely approximates the retributive ideal cannot justify the greater risk of confusion and unjust verdicts.

Juries also should be instructed that they must consider the deterrent effect of the compensatory damages they award and of harm to the defendant's reputation and business caused by the litigation, by the compensatory award, and by the stigma that attends a punitive award of any size. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269, 309 (1983) (deterrent effect of compensatory damages); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1182-83 (1967) (same). The trial court also should inform the jury of the statutory criminal and civil penalties set by the state's legislature for similar wrongful acts, and instruct the jury to con-

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[10] Maine, for example, recognizes deterrence, but not punishment, as a legitimate purpose of punitive damages. *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 362 (Me. 1982) ("deterrence of the tortfeasor is '*the* proper justification' for an award of punitive damages") (quoting *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 345 (1973) (emphasis in original).

sider those in determining what amount of punitive damages, if any, is needed to achieve the proper deterrence.

In reviewing punitive damages verdicts, courts should be required to consider prior punitive damages awards for similar and dissimilar conduct and to determine whether the relationship between the act and punishment in the case being reviewed is proportional to the relationship between those other acts and punishments. The courts also should look for guidance to the relationships between various acts and punishments established by the legislature in criminal statutes and statutes providing for specific civil penalties, including specified punitive damages, such as double or treble damages. If the reviewing court finds that the punitive damages award being reviewed is substantially disproportionate to the defendant's culpability when compared to those guidelines, the court should not defer to the jury, but should order either remittitur or other relief.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court prescribed three factors that must be considered in determining the level of procedural protection required before a citizen's life, liberty, or property may be taken under color of law:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

These considerations strongly support the due process need for more specific punitive damages standards, including those suggested above.

First, the seven-figure verdict in this case and the numerous multi-million-dollar punitive damages verdicts

being awarded with increasing frequency (*see, e.g.*, cases cited in n.4, *supra*) demonstrate conclusively that massive property takings are occurring in punitive damages proceedings. In addition, because the avowed purposes of punitive damages are penal, including to express "social condemnation and disapproval," *In re Paris Air Crash*, 622 F.2d 1315, 1322 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980), punitive damages impose a stigma that requires heightened procedural protection. *See In re Winship*, 397 U.S. 358, 363-64 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971); Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269, 280-84 (1983).

Second, as already shown, Alabama's vague and standardless punitive damages laws create not just a risk, but a virtual certainty, of arbitrary, discriminatory, and therefore erroneous deprivations of property. *See* pp. 10-11, *supra*. By reducing the vagueness through specific standards such as those suggested above, Alabama can reduce, at least to some extent, the magnitude of the risk of error.

Finally, reducing the vagueness of the punitive damages laws will promote the government's legitimate penal interests and will do so without any significant fiscal or administrative burden. Indeed, by making punitive damages awards more consistent, more predictable, and less subject to the whim and caprice of unguided juries, governments may promote settlements, reduce the number of lawsuits brought because of the possibility of a windfall punitive damages verdict, reduce the length of trials, reduce the number of appeals, and facilitate judicial review of punitive damages verdicts. *See generally* Wheeler, *supra*, 69 Va. L. Rev. at 303-20.

CONCLUSION

For the foregoing reasons, the judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 637-3058

DAVID F. ZOLL
Vice President and General Counsel
CHEMICAL MANUFACTURERS ASSOCIATION
2501 M Street, N.W.
Washington, D.C. 20037
(202) 887-1100

NANCY NORD
AMERICAN CORPORATE COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-4522

MALCOLM E. WHEELER
Counsel of Record
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000
Counsel for Amici Curiae

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